HONG LEONG FINANCE BHD

v.

UMAS SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, SIBU
SANGAU GUNTING JC
[SUIT NO: 22-154-2000-I]
2 SEPTEMBER 2003

CIVIL PROCEDURE: *Costs - Application for stay of subsequent action until costs paid - Whether plaintiff ought to pay costs to defendant for earlier action before proceeding with subsequent action - Whether plaintiff should have made an offer or proposal on costs to defendant before commencing subsequent action - Rules of the High Court 1980, O. 21 r. 5*

This was an application by the 3rd defendant to stay the plaintiff's subsequent suit against him ('the second action') pending the settlement of costs by the plaintiff in an earlier suit against the defendants ('the first action'). In the first action, the 3rd defendant had succeeded in his application to set aside with costs the default judgment that was entered against him on the ground that the writ of summons in respect of the first action was not served on him. The 3rd defendant contended that he was unaware that the costs for the first action had not been paid at the time he was served with the writ of the second action and that the plaintiff ought to have made an offer or proposal on the costs. The plaintiff opposed the 3rd defendant's application and averred that it was the 3rd defendant who had delayed in filing his bill of costs to be taxed despite the court order in respect thereof. Further, the plaintiff could not be said to have failed to pay costs if the costs were not taxed and quantified. Also, the 3rd defendant's application for stay was a tactical manoeuvre to delay the plaintiff's second action and that the plaintiff would be prejudiced if the application was allowed.

Held:

[1] After succeeding in having the default judgment entered against him set aside, the 3rd defendant could and should have filed his notice of taxation with bill of costs. The fact that he had been earlier served with the writ of summons concerning the second action and the fact that in respect thereto he had proceeded to enter appearance and file his amended defence should have reminded him of the need to file the relevant notice of taxation

with bill of costs concerning the first action. Instead the 3rd defendant did so only about one and a half years later. Quite clearly, there was an oversight on the part of the 3rd defendant. (p 548 e-f)

[2] The burden was on the 3rd defendant to file his notice of taxation with bill of costs soon after he succeeded in setting aside the default judgment and thereafter to demand from the plaintiff the ascertained amount of costs, if any. The 3rd defendant was not justified in placing an obligation on the plaintiff to make a proposal on the costs, the amount of which was yet to be determined. None of the authorities cited by both parties specifically supported the contention advanced by the 3rd defendant that the plaintiff should have made an offer or proposal on the costs. (pp 548 h & 549 a)

[Application by 3rd defendant dismissed.]

Case(s) referred to:
Chong Woo Yit v. Government of Malaysia [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9 SC ***(refd)***
Graham v. Sutton, Carden & Co [1897] 2 Ch D 367 ***(refd)***
In re United Service Association [1901] 1 Ch D 97 ***(refd)***
In re Wickham [1887] 35 Ch D 272 ***(refd)***
Khoo Kay Hoe v. Chor Phaik Har & Anor [2002] 1 CLJ 317 FC ***(refd)***
Martin v. Earl Beauchamp [1884] 25 Ch D 12 ***(refd)***
Morton v. Palmer [1882] 9 QBD 89 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Palaniappan v. Ramanathan & Ors [1972] 1 MLJ 227 ***(refd)***
Skrine & Co v. MBf Capital Bhd [1998] 3 CLJ 432 CA ***(refd)***

Legislation referred to:
Companies Act 1965, s. 351
Rules of the High Court 1980, O. 21 r. 5, O. 45 r. 7, O. 92 r. 4

For the plaintiff - Alvin Yong Sze Lung; M/s Tan, Yap & Tang
For the 3rd defendant - Azrin Ahmad; M/s Idris & Co

Reported by Usha Thiagarajah

JUDGMENT

Sangau Gunting JC:

The 3rd Defendant's Application
By summons in chambers dated 18 November 2002 (encl. 58), the 3rd defendant, under O. 21 r. 5 of the Rules of the High Court 1980 (RHC), applies for, *inter alia*, an order, that the action be stayed pending settlement of costs by the plaintiff in the Kuching High Court Suit No. 22-11-2000-II.

Background

Briefly, the facts which led to instant application are as follows. Initially Suit No. 22-11-2000-II ('the first action') was instituted against the three defendants. The 3rd defendant's alleged liability in that action was premised on an agreement and guarantee letter both dated 30 June 1997. The said agreement and guarantee relate to a hire-purchase price of 5 logging trucks all c/w trailer, caterpillar, standard logging equipment and accessories, totalling RM2,868,000. Concerning the first action, the plaintiff had on 28 March 2000 obtained a judgment in default against the 3rd defendant. In that first action, as against the 1st defendant, the plaintiff's writ of summons was set aside on 16 October 2000. On 9 December 2000 the plaintiff instituted the present suit ('the second action') against the 1st and the 3rd defendants. On 19 December 2000, the 3rd defendant's advocates filed an application to set aside the certificate of non-appearance and the judgment in default obtained against the 3rd defendant, on the ground that the writ of summons in the first action was never served on him. Subsequently, on 17 May 2001, the 3rd defendant succeeded in having the default judgment entered against him in the first action, set aside with costs. The writ of summons concerning the second action was served on the 3rd defendant on 15 February 2001. In respect of that second action, the 3rd defendant proceeded to enter appearance on 9 March 2001, and thereafter filed his amended defence dated 6 April 2001.

Subsequently, on 24 October 2002 the plaintiff filed in an application to strike out the amended defence of the 3rd defendant in respect of the second action, and a sealed copy thereof was served on the 3rd defendant's advocates on 4 November 2002. Presumably, it was during the process of his advocates' preparation of his affidavit in reply, that "my advocates just discovered that the costs of the first action had not been taxed much less paid by the plaintiff." According to the 3rd defendant, when the plaintiff "proceeded to cause to be served writ of summons in the (second action) on (him), he was not aware at that material time that the costs ... awarded to me for the first action had not been resolved nor paid by the plaintiff."

The Basis Of The 3rd Defendant's Application

The circumstances outlined above presumably led to the 3rd defendant's simultaneously filing in on 18 November 2002 both the application for stay, and a Notice of Taxation with Bill of Costs relating to the first action. It would appear that the 3rd defendant's application that the second action be stayed is mainly based upon the following: that "this present action is premised on the same facility as that in Kuching High Court Suit No. 22-11-2000-II (hereinafter referred to as 'the first action') and the plaintiff has not paid the costs of the

first action to the 3rd defendant." The application is supported by the 3rd defendant's affidavit-in-support, and two affidavits-in-reply dated 15 November 2002, 3 January 2003 and 30 January 2003 respectively.

The Plaintiff's Opposition

The plaintiff opposed the 3rd defendant's application through the three (3) affidavits-in-opposition of their counsel, one Cecilia Law Tiing Tiing, dated 16 December 2002, 3 January 2003 and 17 February 2003 respectively. To reiterate, the 3rd defendant's contentions are, basically, that (i) he was unaware the costs for the first action had not been paid presumably at the time he was served with the writ in the second action, (ii) only during the preparation of his affidavit-in-reply to the plaintiff's application to strike out his amended defence in the second action (received on 4 November 2002), that his advocates "just discovered ... the costs for the first action had not been taxed much less paid by the plaintiff," and (iii) "the plaintiff ought to pay (the 3rd defendant's) costs of the first action before the plaintiff should be allowed to proceed any further with the (second action)." These, the plaintiff say, are "misconceived and a mere afterthought."

After setting out the chronology of events including (a) the setting aside on 16 October 2000 as against the 1st defendant of the first action, (b) the setting aside on 17 May 2001 of the judgment in default of appearance against the 3rd defendant in the first action, (c) the plaintiff's service on the 3rd defendant (on 4 November 2002) of the plaintiff's application to strike out the defence of the 2nd and 3rd defendants in the second action, and (d) the 3rd defendant's filing in simultaneously the application for stay and the Notice of Taxation with Bill of Costs on 18 November 2002 – the plaintiff avers it was the 3rd defendant who had delayed in filing his bill of costs to be taxed despite the order of the court dated 17 May 2001. Hence, the plaintiff say it cannot be said they have failed to pay the costs if the costs are not taxed and quantified, and that the 3rd defendant's application for stay is "a tactical manoeuvre to delay the plaintiff's present suit and in allowing such application will prejudice the plaintiff."

Averments And Submissions Of Both Parties Outlined

The 3rd defendant avers "(the plaintiff) had nevertheless taken out this second suit against me whilst there was in effect a judgment existing against me in the first action." He further avers, *inter alia*, "I was not aware at the time I instructed my advocates to enter an appearance for me (on 9 March 2001) that this second suit is premised on the same cause of action as in the first suit." The reason the 3rd defendant gives for this alleged non-awareness is, "I

did not think the plaintiff would have improperly served (on 15 February 2001) a second writ of summons premised on the same cause of action as that in the first suit where there was already a judgment."

The plaintiff say they took out the second action on 9 December 2002 against the defendants "when the 1st defendant in the first action had on 16 October 2000 managed to set aside the plaintiff's writ of summons in the first action on the ground of mere irregularity." The plaintiff describe as baseless, frivolous and vexations the 3rd defendant's claim, that he "was not aware at the time (he) instructed (his) advocates to enter an appearance for (him) that this second suit is premised on the same cause of action as that in the first suit." The plaintiff maintains the 3rd defendant "was fully aware of the similarity of the cause of action between the first action ... and the present suit ..."

From the relevant averments in their affidavits in opposition, the plaintiff appear to base their contention that the 3rd defendant was fully aware of the similarity between the first and the second actions on the following circumstances:

(a) after the writ of summons in the first action as against the 1st defendant was set aside on 16 October 2000, the plaintiff filed in the second action against the defendants on 9 December 2000,

(b) on 19 December 2000 the 3rd defendant had applied to set aside the default judgment against him in the first action,

(c) the writ of summons concerning the second action was served on the 3rd defendant on 15 February 2001, and

(d) as regards the second action, the 3rd defendant had on 9 March 2001 entered appearance and had filed in "a lengthy statement of defence dated 6 April 2001." Implied in the plaintiff's averments, is that for the 3rd defendant to have been able to do all these, he must have known the "actual cause of action of the plaintiff's present suit."

The 3rd defendant avers, "(i)f there could be said to be any delay in filing the bill of costs to be taxed, (he) ... believe(s), that it is through no intentional fault of any of the parties concerned." In any event, he seems to imply, although the costs had not yet been quantified, the plaintiff, being aware of their having taken out the second action, should have made an offer or proposal on the costs. Rather than being a "tactical manoeuvre," his application, the 3rd defendant seems to imply, is intended to protect himself from "repeated suits by (the plaintiff) without first having to pay the costs awarded." In reply, the plaintiff contended they "would have proposed and paid the costs to the 3rd defendant if the amount of the costs directed to be paid is known to the plaintiff."

Submissions Of Both Parties Considered

To support his application for stay of the second action, the 3rd defendant cited *Chong Woo Yit v. Government of Malaysia* [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9, *Palaniappan v. Ramanathan & Ors.* [1972] 1 MLJ 227, *Martin v. Earl Beauchamp* [1884] 25 Ch. D 12 and an order (granting a stay pending payment of costs) of High Court of Malaya dated 4 November 1997 in Suit No. D3-22-733-1997.

That such an order was made in Suit No. D3-22-733-1997 to stay the action against the defendant pending the settlement of costs by the plaintiff, seems clear enough. The facts leading to the granting of the said order, however, were not provided. As regards *Chong Woo Yit*, the Supreme Court's granting of stay of execution was based on inherent jurisdiction, whereas the instant application appears to have been specifically based on O. 21 r. 5 of the RHC. In any case, the facts and circumstances which led to the granting of stay in that *Chong Woo Yit*, would appear distinguishable from the facts and circumstances from which the present application was launched.

Palaniappan v. Ramanathan & Ors. (supra) seems to have been decided primarily based on the principle enunciated in *Martin v. Earl Beauchamp*, where Cotton LJ said:

> The rule is established that where a plaintiff having failed in one action commences a second action for the same matter, the second action must be stayed until the costs of the first action have been paid.

At the outset, it is to be noted that in *Palaniappan*, the costs in the previous action had been quantified. Further the previous action in that case was dismissed for want of prosecution. In the present case, it seems undisputed that the first action as against the 3rd defendant was "struck out with liberty to file afresh ..." The 3rd defendant's summons in chambers to set aside the judgment in default of appearance entered against him in the first action, was conceded to by the plaintiff. Even if there is any cost due to the 3rd defendant, the plaintiff say, "the amount would be minimal ..."

Anyway, the plaintiff say the 3rd defendant's application is "premature". This contention is based on O. 45 r. 7 of the RHC, which essentially says a judgment or order shall not be enforced unless a copy of that judgment or order has been served personally on the person required to comply. The plaintiff argues as the taxation has not been heard, "(the) issue as to whether any cost may in fact be payable is not yet determined." There was no final order as to the amount of costs, if any, payable. The plaintiff cited *Khoo Kay Hoe v. Chor Phaik Har & Anor.* [2002] 1 CLJ 317 to say that an allocatur is a final

judgment or order, and implicit in the plaintiff's submission is, that there was, in the instant application, no allocatur as at the date of the hearing. Learned counsel for the plaintiff pointed out that the 3rd defendant took out the present application "only after one year and six months after determination of the first suit and at the stage of hearing of the plaintiff's striking out in the second suit."

The 3rd defendant's present application dated 18 November 2002 is based on O. 21 r. 5 of the RHC. Learned counsel for the plaintiff says O. 21 r. 5 "can only be exercised in cases of withdrawal or discontinuance." Cited in support was *Malaysian High Court Practice,* where it was stated at p. 808" "This (O. 21 r. 5) can only be invoked if the action was discontinued or withdrawn with costs awarded to the other." The said learned counsel further contends, "(t)he exercise of the courts power under O. 21 r. 5 RHC is subject to judicial discretion and not as of right." He says O. 21 r. 5 "is also an exercise of the courts inherent jurisdiction under O. 92 r. 4 (of the RHC)." Again *Malaysian High Court Practice* (at p. 5761) was cited: "It is clear from the foregoing that it will not be possible to provide an exhaustive list of all the circumstances in which a court will claim to have inherent jurisdiction, but it is possible to identify certain areas where such a jurisdiction has been exercised or declined as follows: (a) to stay or dismiss or otherwise nullify all proceedings before it, which are obviously frivolous or vexatious or an abuse of its process."

However, the plaintiff's counsel seems to submit, that in any case, "the court cannot invoke its inherent jurisdiction where sufficient remedies have been provided for in statutes." This contention is based on s. 351 of the Companies Act 1965 which says: "Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given." As s. 351 of the Companies Act provides for statutory remedy, the plaintiff's counsel submits, "the court should not exercise its inherent jurisdiction to stay the proceedings in the present suit."

In any case, the plaintiff's advocate, seems to say, a stay cannot be granted by the court, "unless the 3rd defendant can show that the plaintiff can't pay the cost." And he contends, "(t)here is no reason to believe that the plaintiff can't pay the cost." In support *Skrine & Co. v. MBf Capital Bhd.* [1998] 3 CLJ 432 was cited (at pp. 446-447): "we may add that it is not necessary that a company must be readily possessed of cash in order to satisfy a court that it is in a position to pay the costs of an action brought by it in the event of failure." Anyway, the plaintiff's counsel says "(i)t is never denied or disputed

that the plaintiff has the ability to pay the cost awarded to the 3rd defendant if any." He further says the plaintiff's averment in para. 6 of plaintiff's affidavit dated 17 February 2003, that the plaintiff has the ability to pay the costs awarded to the defendant is never denied, "thus deemed admitted." Cited in support is *Ng Hee Thoong & Anor. v. Public Bank Bhd.* [1995] 1 CLJ 609 where it is stated: "In evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted."

As earlier mentioned, yet another contention of learned counsel for the plaintiff is, that a defendant is not entitled to a stay in proceedings as of right. He submits the plaintiff must be ordered to pay cost and must have failed to comply with the order. Further, he says, the plaintiff's second or fresh action must be oppressive and vexatious. In support *Morton v. Palmer* [1882] 9 QBD 89, *In re Wickham* [1887] 35 Ch. D 272, *Graham v. Sutton, Garden & Co.* [1897] 2 Ch. D 367, and *In re United Service Association* [1901] 1 Ch. D 97 were cited.

In *Morton v. Palmer* the costs of certain interlocutory proceedings in the former trial had been taxed and had not been paid by the plaintiff, yet the defendant's application for stay of further proceedings in the action until the costs were paid was refused. However, that decision seems to hinge substantially on the fact, that although the plaintiff succeeded in the former trial, the verdict was set aside for misdirection. The court was of the view that the plaintiff's right to go to a second trial should not be made conditional on the plaintiff paying those costs.

In re Wickham it was said by Lindley LJ: "I agree that non-payment of costs *per se* is not ground for staying proceedings ... It appears to me that under the present practice, whenever it can be shewn that a person is proceeding vexatiously in not paying costs which he has been ordered to pay, the court has jurisdiction to stay the proceedings." This principle was also applied in *Graham v. Sutton, Carden & Co.*, where Lopes LJ said: "If the application rested solely on the ground of non-payment of costs, or on non-payment coupled with inability to pay, it could not succeed ... If the action is vexatious, or if the plaintiff in the course of it acts vexatiously towards the defendant, the court has jurisdiction to stay proceedings till the costs which the plaintiff has been ordered to pay are paid."

The emphasis of the learned counsel for the plaintiff in citing these cases seems to be, that for a stay to be granted, costs must first be taxed, and that the action of withholding payment of costs must be Vexatious. Implicit in his submission is that, in the instant case, as the cost has not been taxed and as the issue of vexatious proceedings by the plaintiff was never raised, no stay could be granted. Having regard to the facts and circumstances of ... the present case, this contention by the plaintiff appeared to me tenable.

To recap, there was, in this case, a reasonable basis for the plaintiff to institute as they did the second action premised on the same cause of action as the first action had on 16 October 2000 been set aside as against the 1st defendant. It is common ground that on 19 December 2000 the 3rd defendant filed an application, *inter alia*, to have the judgment in default entered against him in the first action set aside, and that he succeeded in that application on 15 May 2001. Now during the period of about three months prior to that day (15 May 2001), the following events occurred: on 15 February 2001 the writ of summons concerning the second action was served on the 3rd defendant, on 9 March 2001 the 3rd defendant proceeded to enter appearance in respect of the second action, and thereafter he filed in his amended defence in respect of that second action.

Now after succeeding in having the judgment in default entered against him in the first action set aside on 15 May 2001, the 3rd defendant could and should have thereafter filed in his notice of taxation with bill of costs. The fact that he had earlier been served with the writ of summons concerning the second action, and the fact that, in respect thereto, he proceeded to enter appearance and filed in his amended defence should have reminded him of the need to file in the relevant notice of taxation with bill of costs concerning the first action. Instead the 3rd defendant did so only about 1 1/2 years later ie, on 18 November 2002. Quite clearly and as conceded by the 3rd defendant there was an oversight on the part of the 3rd defendant. This has to some extent watered down his contention, that nevertheless the plaintiff should have made a proposal on the costs.

Anyway, the burden was on the 3rd defendant to file in his notice of taxation with bill of costs soon after 15 May 2001 and thereafter to demand from the plaintiff the ascertained amount of costs if any. Prior to the 3rd defendant himself fulfilling this burden, it seems neither logical nor fair to expect the plaintiff to make a 'proposal' on the costs, the amount of which was yet to be determined. The plaintiff having instituted the second action and served on the 3rd defendant the writ of summons in respect thereto, while the default judgment in the first action was still in existence, does not, in the circumstances of this case, exonerate the 3rd defendant from fulfilling his responsibility of

filing in his notice of taxation with bill of costs as soon as it became reasonable and/or necessary for him to do so. Neither does it justify the 3rd defendant's placing obligation on the plaintiff of initiating an "offer or proposal on the costs." In any case, none of the above-discussed authorities cited by both parties, seem specifically supportive of the said contention advanced by the 3rd defendant – that the plaintiff should have made an "offer or proposal on the costs ..."

It was on the grounds adumbrated above, that I dismissed the 3rd defendant's application.